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ABSTRACT

This paper discusses the implications for schools, physical education, teachers, and coaches in the increasing tendency of students and/or their parents to resort to legal action in the case of school-related injury. The number of cases involving litigation against these institutions and their personnel has multiplied rapidly. The amount of damages sought in these cases is currently spiraling upward toward sums in the millions. Typical cases are cited, and some possible defensive policies are considered. (JD)

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RECENT CHANGES IN THE LEGAL ASPECTS OF PHYSICAL EDUCATION AND ATHLETICS

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When I first accepted the invitation to speak at this meeting I was not certain just how I would approach this matter of the legal aspects of physical education and athletics. I went to my book dealing with this area and the decision on what to discuss became quite obvious. My book, which was published less than ten years ago, was obviously outdated and I decided a valuable approach would be to update such information.

Even though we will be discussing information which, as far as I know, is current, some of it could be changed today, tomorrow or next week. Legal actions which are now underway could result in a complete reversal. As someone has mentioned, decisions are often determined by how the judge feels on a particular day. Obviously, this is a constantly fluctuating situation.

We are existing in an era characterized by the "sue syndrome." If you will review your daily newspapers it is doubtful if you would find a copy without the mention of some legal action taking place, being considered, or being threatened.

There are so many areas where changes have taken place it would be impossible to cover them all. Some I may omit, some I may pass over hurriedly.

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With the time available I intend to touch upon several areas which seem to me to be important to our profession.

One of the more fluctuating situations concerns state statutes. One important aspect is the status of sovereign immunity. Up until recent years approximately one half of the states could not be named in a legal liability suit. However, this is rapidly changing and the courts are deciding that the states should be held liable where this unit is basically at fault. Illinois, Minnesota, and just last year, Missouri have all lost their immunity. These decisions, of course, have an affect upon the school systems of these states.

Another aspect is the status of the physical education requirement. The attitude is rapidly changing and several states have eliminated the mandate. Maryland no longer has a state mandate as such, with the requirements left up to the county boards of education. New York is substituting athletic participation for the physical education requirement and there is legislative action in New Jersey to institute similar action.

As we move into the area of negligence and liability we must recognize this encompasses three distinct areas - product, premises and operation, and errors and omissions. I will discuss each of these but not necessarily in that order.

As teachers and coaches we do have a duty to protect participants. The origin of this duty can be based on three factors:

1. it is inherent in the situation
2. there is a voluntary assumption
3. it is required by statute

We can classify individuals involved in activities or utilizing facilities into three categories. Invitees are those invited or required to participate in our activities, including physical education students and athletes. Licensees are not specifically invited but can enter and use the facilities with the possessors knowledge. They must generally take the premises as they find them with the exception of hidden dangers. Trespassers are owed no responsibility but must not be exposed to hidden traps or the like.

The Fitzsimmons vs Stony Brook case set an interesting precedent when a youngster was severely injured when he ran into a wire cable when running into the gymnasium. The college contended they had no responsibility for this individual since he was not a college student and should be considered a trespasser. The court, on the other hand, felt that since the youngster and several of his friends had been using the college gymnasium for some time and had not been denied admission, they should be considered as licensee's and the college was, therefore, responsible for their safety.

In order to be considered negligent, four elements must be proven:

1. There was a duty to conform to standard behavior which would have prevented an injury.
2. There must have been a breach of this duty.
3. The breach of duty must have been the cause of the damage.
4. It must be proven that damage did occur.

Defenses against negligence include:

1. Assumption of risk, but not an assumption of undue risk.
2. Contributory negligence, where the individual contributes to his injury.
3. Comparative negligence where both parties contributed to the injury.

To counteract the claim of contributory negligence the courts can utilize the "last clear change" tenet, where it can be proven that the defendant had the last opportunity to prevent the damage. Comparative negligence fell from favor for a period of time but seems to be returning, particularly in auto accidents.

Both actions and lack of actions can result in liability suits. Negligent acts are classified into three general areas:

1. Misfeasance is performing an act which is within your scope of work but it is done incorrectly.
2. Malfeasance is performing an illegal act or one which was not within the scope of your responsibility.

3. Non-feasance is failure to perform an act which should have been performed.

The judgements as to the qualifications of a supervisor are even in a state of flux. Formerly, in many states a coach had to be a certified teacher in the school district where he or she was coaching. Now we have variations entering the picture where a coach can be from another school district, or a coach may be a certified teacher but is not teaching. In public schools they are even permitting individuals who are not certified teachers to coach, although they may be required to gain some type of coaching certification.

There was a case in 1970 where the court felt the individual hired to coach a wrestling team was not qualified and the settlement for the injury was $385,000.

The dangers to student teachers in the area of liability are becoming more obvious and several states are protecting them under their comprehensive liability coverage. The House of Delegates in Maryland took this action in 1974 and even made them eligible for workman's compensation.

Warning students of dangers can protect the teacher. One teacher warned a student of the dangers of performing a particular stunt over the horse. The student was injured and the instituted legal action. The courts felt that due to the warning this protected the teacher against liability. In the litigation which followed it was revealed that the principal had warned students against this practice and the court felt, therefore, there was no negligence.

Another aspect is that of legal causation. During a basket ball game in a physical education the teacher was called out of the gym by the principal. Two players collided and one was injured. The judge felt the accident would have occurred even if the teacher had been in the gymnasium and thus there was no negligence.

Teaching techniques have been the basis for legal actions. In 1976 in the Mark vs Colgate University case a football player indicated that he had been taught to spear tackle by the coaching staff. As a result he broke his neck. Even though the defendants were found not guilty it opens up a whole new area for legal actions against coaches.

A negligent act by a participant is a relatively new approach to liability. We are all probably familiar with the professional ice hockey case, and the recent Kermit Washington-Rudy Tomjanovich incident. A more recent case involved a rugby player in France who was found guilty of gouging an opponent.

There was a legal action in Illinois in 1975 where a soccer goalie was kicked in the head while in the goal area which resulted in a serious injury. The court indicated that some restraint must be involved and that a participant does not assume risks that results from the negligence of another participant. This could set a precedent that deliberate violation of rules with an intent to inflict injury can result in liability.

The extent of litigations can be nebulous. A 16 year old boy was severely and permanently injured in a basketball game in the State of Washington in 1974. His parents sued for $950,000. They named in the suit the state high school athletic association, the two school districts of the participating teams, the basketball officials' association, the player's coach and his wife, the opposing coach and his wife, the two referees, and the player who allegedly caused the injury. I don't think they missed anyone.

Negligence involved in assault by other students depends upon circumstances. In one case a student in physical education class was assaulted on the playground by three students who were not in the class. The teacher had gone to the locker room. The court felt this was negligence. In another similar case a teacher was sheperding students into the locker room. As he was outside one student attacked another inside the locker room. The court felt this was not negligence.

In my book I mentioned the possibility of litigations involving training and conditioning. Such situations have arisen since that time. In 1970 two coaches were found guilty when a boy died from heat exhaustion and the courts felt they had provided improper emergency care. Last fall a Virginia Tech football player was required to perform a punishment type of drill. Later he dropped dead.

An investigation following the incident indicated that there had been no wrong-doing and there had been no criminal action. However, this could result in a civil suit for negligence.

The past few years have brought forth some rather interesting situations regarding handicapped athletes. As one-eyed basketball player at Ohio University was denied the opportunity to participate. The courts ordered the university to permit him to play. The same decision took place in Missouri where two football players were permitted to play under court order. Reverse decisions were made in cases involving a football player who was hard of hearing, two one-eyed athletes, and a youngster with one kidney.

This past fall a football player in New York City, who had been born with one arm was prohibited from participating by the school physician. One week later he was reinstated by the head of the City's Bureau of Health. Just this past January the American Hockey League denied participation to a one-eyed hockey player. A judge ruled that this violated his rights and that he should be permitted to participate.

To protect against possible legal action the New York State Legislature passed a law which waives liability for handicapped participants. If the individual is told he or she cannot participate by the school, the individual can seek court permission to do so if two doctors support such participation.

This law then relieves the school of liability.

What about the concept of "mainstreaming?" This could raise some interesting questions. What procedures should be used if a non-insurable individual is permitted to participate in the regular program?

A year or so ago I had an article dealing with the legal responsibilities of athletic trainers published in the JOURNAL OF HEALTH & PHYSICAL EDUCATION. In this article I mentioned the dangers of student trainers. I received a violent reaction from an athletic trainer in the Mid-West, indicating that I was all wet and that I was thwarting the preparation of students interested in athletic training. My reference was not to college students preparing for a career in athletic training but to the high school student who receives a smattering of an education in this area and is then assigned training responsibilities. Let one of these youngsters step beyond the real of first aid or simple prevention and dabble in the area of treatment and see who is named in the legal action.

The transportation of students has always been a prime target for liability suits, particularly due to the high incidence and seriousness of the injuries. We, as teachers, often have little to do with arrangements, schedules and the like. However, there is one area with which we should be familiar.

That is the status of the "guest statute" in each state. Where such a statute is in effect, a passenger in your car cannot sue you for negligence unless it is gross negligence. If there is no "guest statute" in your state you can be held responsible and, as teachers, there are numerous occassions when we transport youngsters for one reason or another for school activities. In addition to checking on the "guest statute" it would be avisable to review your auto insurance.

At the present time there are indications that the use of the trampoline in the school program is being questioned. Due to several serious accidents a number of school districts have eliminated them from their programs in gymnastics. The City of Baltimore does not utilize them, and only last week the Baltimore County schools were directed to eliminate them from their programs. In one case a boy in Long Island was injured on a trampoline while performing a front somersault. The teacher indicated that he would fail if he did not perform this stunt. The youngster sustained a serious head injury which had long lasting effects. The courts awarded him $125,000. A short time ago the American Pediatrics Association expressed the opinion that the trampoline should be eliminated. Only the future will tell which way the trend will move.

A few years ago there were no legal actions against ahtletic officials. The Washington case which I mentioned previously is one of the few. The recent Bubba Smith case is another example that the trend may be changing. Officials, of course, have been exposed to situations where they have instituted legal action. In West Virginia a Little League coach was sued for $105,000 when he struck an official with a bat and fractured his skull.

Facilities, of course, have been the basis for numerous legal actions. In recent years there have been several such cases involving the dangers of artificial turf. Even the new approach to football field construction, PAT, was the basis for a litigation involving a professional football player.

Insurance rates are sky rocketing due to the financial settlements given to plaintiffs. When we get into product liability we will discuss costs further, but I am now concerned with activity type coverage. In California several school districts had to drop skiing, surfing and scuba due to the increase in their liability insurance because of these activities. They also eliminated the use of the trampoline when their premiums jumped to $11,000 per trampoline. Vermont ski areas may lose their liability coverage, based largely on the recent case in which a skier was awarded $1.5 million. This is currently being appealed to the Vermont Supreme Court.

The market for school liability insurance is rapidly decreasing. Schools are joining together to pool their knowledge and resources and to reduce insurance premiums. The trend may be to self insure, which is dangerous practice. Los Angeles in December of 1977 received a rate adjustment which raised their premium to $950,000 and this with a $1 million deductible.

State athletic associations for years set their eligibility standards and were rarely challenged. As of recent years there has been a change in attitude and some of the unreasonable rules and regulations are being questioned in the courts. Such areas dealing with transfer rules, age rules, married students being denied participation, and the like have been heard in the courts. Regarding married students, for years both local and state associations had been successful in denying participation, but several recent cases have reversed this concept.

For years Iowa had the "beer rule" which did not permit an athlete to ride in a car which contained beer. This rule was over-ridden in a court case and removed from the state regulations. Courts feel that rules and regulations are fine as long as they are neither arbitrary nor capricious, which obviously the "beer rule" was.

There have been several challenges of the NCAA on eligibility rulings. The courts have generally supported the NCAA, but it is now under investigation itself for some of the methods they have used.

The right to deny admission to spectators has been quite consistent over the years as long as the rules were reasonable. This concept has been supported recently when a woman was denied admission for one year from all Louisiana High School athletic events. It seems she had an altercation with a basketball official and when denied future admission took the case to court, where the state athletic association's decision was upheld. A Tennessee school was suspended from athletic participation due to the misconduct of the spectators and cheerleaders. In the litigation which followed the court supported the state athletic association.

One of our most recent problems had involved the rights of the individual. The question in many of these cases has been the right to impose regulations. The Tinker case in Ohio set the precedent when youngsters showed up at school wearing black arm bands in protest of the Vietnam War. The school suspended the youngsters and when the case came to court it was decided the students had a right to express their opinions as long as it did not interfere with the functioning of the school. In the late '60's and early '70's there were several cases involving the right of coaches to impose hair length regulations. Of 104 cases reported, 58 were decided in favor of the school and 46 in favor of the plaintiffs. Certainly no clear cut decision either way.

The trends in this area include:

1. Countless cases involving the rights of athletes, coaches and institutions.

2. The welfare of the individual will be paramount as individua's continue to use safeguards provided in the 1st, 5th, and 14th Admendments.

3. Athletic directors will take a hard line against athletes and coaches who do not comply with NCAA regulations.

4. Group punishment for the acts of a few will be the source of litigations.

5. The 70's will be the age of individual rights as never before in athletic history.

The Constitution guarantees "due process" and there are specific procedures which must be applied to disciplinary cases. Forsythe and Keller in their book, THE ADMINISTRATION OF HIGH SCHOOL ATHLETICS, lay out these specific procedures.

1. Individuals must know the standards and/or regulations they are to meet.

2. If there is a violation, there must be adequate notice of the charges.

3. Time must be permitted to prepare answers to these charges and provide evidence in his or her behalf.

4. There must be an appropriate hearing to consider the evidence for or against the individual.

5. A fair and impartial decision must be made and the decision put in writing.

We must also remember the term utilized earlier, none of the above may be "arbitrary or capricious."

Another important factor, as related to the above, is that the courts in several instances have supported the theory that athletic participation is a privilege and not a right.

Although many of the cases have merit there are always those cases receiving publicity which are ludicrous. In Michigan a basketball player sued his coach for $100,000 for benching him during the state basketball playoffs. He implied this had created emotional damages and had harmed his reputation. I don't believe the case got very far in the courts.

There have been numerous legal actions concerning the rights of women as related to athletic participation. Title IX, of course, has done much to equalize the opportunities but there are still litigations. Several states have passed legislation which permits girls on boys' teams in non-contact sports. Connecticut, New Mexico, New York and several others do have such legislation. Massachusetts passed such an act but the courts are in the process of revising this regulation. In Maryland the decision was that girls could participate on all teams. In Ohio the state athletic association had a ban on contact sports for girls but the courts reversed this decision. An interesting sidelight on this case was that the athletic association indicated they were following the recommendations put forth by Title IX. The courts said that based on the 14th Amendment that this could make Title IX unconstitutional.

Another aspect of girls' sports had to do with 6 person basketball as opposed to 5 person basketball.

Two cases were litigated with the plaintiffs indicating their opportunity for athletic scholarships would be nil due to the nature of the 6 person game, since colleges play the 5 person game. These cases were against the state athletic associations of Oklahoma and Tennessee. In both cases the courts found for the state athletic associations.

Recently the NCAA challenged the legality of Title IX but a district court ruled against them.

The "sue syndrome" is nowhere more obvious today than in the area of product liability. The old concept of the "buyer beware" has had a complete reversal when it comes to court decisions. The concept today would seem to be "manufacturer beware." Although they had nothing to do with our profession, there were two recent decisions within the last month which will indicate the extend of settlements. In February two cases involving the exploding of fuel tanks in automobiles were decided. In one case the plaintiff was awarded $2.5 million and in the other, believe it or not, the plaintiff was awarded $128 million. Both cases are being appealed but this does indicate the attitude of the courts in cases involving product liability.

Litigations normally attempt to prove that the product was defective when it was manufactured. Capital losses from legal actions rose 135% in 4 years with 54% of the cases decided in favor of the plaintiff.

One company was carrying a $7 million liability policy with the premium of $300,000 per year. They decided they would self-insure, but one big settlement would wipe them out. There were 50,000 cases in 1960 with the average award of $11,000. In 1960 there were 500,000 cases. In 1975 there were one million cases with an average award of $338,000. We can expect two million cases per year by 1980.

What does this mean to our profession? This could mean the elimination of the smaller companies and even certain products. The increase in prices might well eliminate high risk activities such as football or gymnastics. The prices of football helmets could jump from $30 to $300. Right now there are over 100 cases involving football helmets pending with total claims of between $300 and $400 million.

The precedent setting case was Stead vs Riddell involving a high school football player in Miami who received a broken neck and is now a quadraplegic. The courts felt, after extensive testimony, that the helmet was at fault and awarded the player $5.3 million and $73,000 for medical expenses. Right now there is one case pending with a claim for $15 million. Of the fourteen companies who were manufacturing helmets, six of them have discontinued production. The profit for all companies on helmets was $1 million. How can they afford to continue?

Another extreme example was a case which was settled out of court. The equipment was not defective and instructions on proper use were provided. But the decision was that the manufacturer should have known that someone would use it improperly and should have provided a warning.

One solution to this problem is that there must be improved communication between athletic and physical education personnel with the manufacturers of athletic and physical education equipment.

As I mentioned at the outset, I have attempted to concern myself with only the changes in attitude of the courts. You can see several of these have been dramatic. To reiterate once again, this is the situation as it exists today but there is no telling what will take place tomorrow in some courtroom and result in even more radical changes in the legal considerations.